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No. 718

IN THE

# Supreme Court of the United States

October Term, 1940

L. R. BROOKS,

Petitioner,

*v.*

ARCHIE J. DEWAR, *et al.*

*On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada*

## *MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF A WRIT ON THE SECOND AND THIRD QUESTIONS PRESENTED*

WILLIAM J. DONOVAN,
2 Wall Street,
New York, N. Y.

MILTON B. BADT,
First National Bank Building,
Elko, Nevada,
*Counsel for the Respondents.*

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## OPINIONS BELOW

The opinion of the Supreme Court of Nevada (R. 42-57) is reported in 106 P. 2d 755. The District Court did not write an opinion.

## JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Nevada sought to be reviewed was entered on October 24, 1940 (R. 57). The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the de-

cision below denied rights, titles and immunities claimed by the petitioner under the Constitution, statutes and authority of the United States (Pet. 1-2).

The "jurisdictional statement" in the petition is in error in stating that the District Court "ordered the Regional Grazier to permit certain stockmen in Nevada to graze their livestock on the public domain 'in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license' prescribed by the Secretary's rules and regulations" (Pet. 2). The decree of the District Court provides:

> "That the defendant herein be, and he hereby is perpetually enjoined from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 in default of payment of the grazing fee of five cents per month or fraction thereof per head of cattle, and one cent per month or fraction thereof per head of sheep, grazed upon such public range and in default of obtaining a new temporary license as required by said rules of March 2, 1936" (R. 35).

This decree confers no affirmative rights with respect to the public range. Even the negative relief granted thereby is extremely limited in character. The petitioner Brooks is not enjoined from barring the respondents from the range for violation of any *lawful* rule or regulation promulgated by the Department of the Interior. The only prohibition upon Brooks is that he not bar the respondents from the range for failure to pay the fees and obtain the licenses required by the Rules of March 2, 1936, which conditions the respondents claim (and the courts below have held) were unauthorized and invalid.

## QUESTIONS PRESENTED

The questions presented, as framed by the petitioner, are:

1. Whether, under the Taylor Grazing Act, the Secretary of the Interior has authority, pending the collection of the data necessary for the issuance of term permits, to charge a low uniform fee for temporary licenses issued to persons grazing livestock on public lands within grazing districts established under that Act.[1]

2. Whether the United States is an indispensable party to a suit brought by stockmen in Nevada to compel the Regional Grazier to permit them to graze their livestock on the public range in that state without procuring a temporary license and without incurring liability for the fees prescribed therein.

3. Whether the Secretary of the Interior is an indispensable party to a suit brought to enjoin a subordinate from enforcing rules and regulations which the Secretary himself promulgated (Pet. 3).

As noted above, the second question presented is improperly phrased in that the decree did not confer any affirmative rights on the respondents.

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[1] The respondents' complaint alleges that the Rules of March 2, 1936 were illegal and void not only because the fees required thereby were uniform but on several other grounds. (See Complaint, par. 14, R. 8-10.) If the complaint can be sustained on any of these grounds, the judgment below may be affirmed even though the first question presented is decided adversely to the respondents. If the writ issues the respondents will argue these points in accordance with the rule announced in *Stelos Co.* v. *Hosiery Motor-Mend Corp., et al.*, 295 U. S. 237, 238-9 (1935).

## STATEMENT

This case arose in the Supreme Court of Nevada on appeal from a decree of permanent injunction entered upon the petitioner's failure to answer further after his demurrer to the complaint had been overruled (R. 34). As stated by the court below, the petitioner did not move to strike out any part of the complaint, and, since he elected to stand on his demurrer, every relevant and material fact alleged in the complaint must be accepted as true (R. 56). These allegations appear at R. 1-28 and a detailed description thereof is contained in the opinion of the court below at R. 42-49.

The "statement" in the petition is defective in that it ignores relevant and material allegations which must be considered if a writ issues to review the first question presented. Since the respondents do not oppose the issuance of a writ to review that question, they accept the petitioner's "statement" for the purposes of this memorandum.

## SUMMARY OF ARGUMENT

The respondents do not oppose the issuance of a writ to review the first question presented by the petition. They oppose the issuance of a writ to review the second and third questions presented for the reasons that (1) the Supreme Court of Nevada correctly held in accordance with the decisions of this Court that the United States is not an indispensable party to this suit, and (2) the question whether the Secretary of the Interior is an indispensable party to this suit is a question of state practice and procedure and the decision of the Supreme Court of Nevada on this question is conclusive.

## ARGUMENT

### I.

**The Supreme Court of Nevada correctly held in accordance with the decisions of this Court that the United States is not an indispensable party to this suit.**

The only relief which the respondents seek in this suit is an injunction restraining the petitioner Brooks from doing something which he has no authority to do—viz., enforcing the unauthorized and illegal Rules of March 2, 1936 which were purportedly promulgated under authority of the Taylor Grazing Act. The decisions of this Court establish beyond dispute that such a suit is not one against the United States or one to which the United States is an indispensable party. When a government official acts without authority, his act ceases to be the act of the Government; he stands stripped of governmental sanction and acts as an individual.

*Noble* v. *Union River Logging Co.*, 147 U. S. 165 (1893);

*American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902);

*Ex parte Young*, 209 U. S. 123 (1908);

*Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912);

*Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135 (1919);

*Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228 (1921).

The petitioner seeks to distinguish this case from the authorities cited on the ground that this is a suit brought "to acquire an interest in, or the right to use" the public lands. He argues that:

> "Respondents have no property rights in the public grazing lands in Nevada. Their implied license to graze livestock on such lands was terminated by the Taylor Grazing Act. Cf. *Light* v. *United States*, 220 U. S. 523, 535. Their suit is not one to enjoin an officer of the United States from interfering with their rights in the public range, but rather a suit to compel an officer to permit them to use the public range in conjunction with their private grazing facilities, on the plea that the latter cannot be profitably operated unless respondents are also allowed to make use of the public domain" (Pet. 13).

The petitioner's argument that the respondents are seeking to establish a right or title adverse to that of the United States is erroneous. Prior to the passage of the Taylor Grazing Act, the respondents had an implied license to graze their cattle on the public range. (*Light* v. *United States*, 220 U. S. 523, 535 [1911].) The Taylor Grazing Act by itself did not revoke the respondents' implied license. It provided that the Secretary of the Interior "is authorized, in his discretion, by order to establish grazing districts * * *" (Section 1, R. 15) and that the publication of notice of the establishment of a district "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement" (Id., R. 16). The withdrawal of lands from entry of settlement, however, did not revoke the re-

spondents' implied license to graze their livestock on the public range. Even the promulgation of rules and regulations under Section 2 did not destroy the respondents implied license if, as claimed, the rules and regulations are invalid. It is only when a valid licensing system is established under the Taylor Grazing Act that the respondents' implied license to graze their livestock on the range can be impaired.

In each of the cases cited by the petitioner, a party was attempting to establish or rely on a title adverse to that of the United States. In *United States* v. *Minnesota*, 305 U. S. 382, this Court held that the United States was an indispensable party defendant in condemnation proceedings brought by a state to acquire a right of way over lands which the United States owned in fee. In *New Mexico* v. *Lane*, 243 U. S. 52, the State of New Mexico claimed to have acquired title to certain public lands, and the Secretary of the Interior had been enjoined from disposing of them through issue of a patent thereto to a private individual. In *Louisiana* v. *Garfield*, 211 U. S. 70, the State of Louisiana sued to establish its title to certain public lands which the Secretary of the Interior had ordered held for disposition under the General Land Laws.

In seeking to protect their right to do business from unauthorized intervention by the petitioner Brooks, the respondents are not seeking to establish any right or title adverse to that of the United States. They are merely saying that (1) they have an implied license to graze their livestock on the public range until Congress or some official properly acting under the authority of Congress revokes their implied license; (2) the authority which Con-

gress gave the Secretary of the Interior to revoke their implied license has never been properly exercised; (3) the continued enjoyment of their implied license is indispensable to the conduct of their businesses; and (4) the petitioner Brooks, acting under color of invalid rules and regulations, threatens to destroy their businesses by interfering with their implied license.

Upon this petition we must assume that the Rules of March 2, 1936 are invalid. Unless the respondents' contentions with respect to those rules are "so unsubstantial and frivolous as to afford no basis for jurisdiction" the respondents are entitled to prosecute this suit and to have it determined without joining the United States as a party, even though it may ultimately be held that the Rules of March 2, 1936, are authorized and valid (*Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 152 [1919]). The allegations of the complaint and the decisions of the courts below show that the respondents' attack upon the Rules of March 2, 1936, is neither unsubstantial nor frivolous.

Two federal district courts have had no difficulty in deciding this question in accordance with the principles heretofore laid down by this Court.

On October 21, 1936, the United States District Court for the District of Nevada remanded this case to the state court whence it had been removed by the petitioner. The court found specifically that the interests of the United States were not involved in the suit, saying:

> "* * * The plaintiffs do not question the right of the United States government, through the Congress, to regulate the use of any part of its public domain. Nor do they question the right of the Con-

> gress to enact the Taylor Grazing act, or the delegation of power to the Secretary of the Interior, under the act, to require the payment of a license fee. They assert a right *not contrary* to the act, but one *under it.*" (*Dewar* v. *Brooks,* 16 F. Supp. 636, 643-44 [1936].)

Thereafter the United States itself brought suit, seeking to have the further prosecution of this action enjoined on the ground, *inter alia,* that "property rights of the United States are involved, and that the United States is an indispensable party defendant to said suit." The respondents moved to have the suit of the United States dismissed. Their motion was granted, and the Court said:

> "It is further contended 'that property rights of the United States are involved, and that the United States is an indispensable party defendant in said suit.' The case at bar does not present any question of trespass or threatened unlawful trespass upon the public domain or any question of claimed right thereon in conflict with the paramount rights of the United States therein." (*United States* v. *Dewar,* 18 F. Supp. 981, 983 [1937].)

The United States never appealed from the decree of dismissal in *United States* v. *Dewar.*

## II.

**The question whether the Secretary of the Interior is an indispensable party to this suit is a question of state practice and procedure and the decision of the Supreme Court of Nevada on this question is conclusive.**

Respondents believe that the court below correctly decided that the presence of the Secretary of the Interior

is not in any way necessary to a complete determination of this suit; that complete relief can be granted without his presence; and that such relief will neither prejudice his rights nor restrict his activities. (*Colorado* v. *Toll*, 268 U. S. 228 [1925].) On this petition, however, we need not go into this question. Nor, need we go into the question whether the law as to necessary parties in the federal courts should be clarified.

The issue here presented is not a federal question but one of general equity jurisdiction. This is made clear by the origin of the rule for which the petitioner contends. As Judge Learned Hand observed in *National Conference on Legalizing Lotteries* v. *Goldman*, 85 F. (2d) 66, cited by the petitioner,

> "The whole notion [of the indispensability of a superior officer] appears to have had its source in a judgment of Lord Hardwicke's in 1740 (*Vernon* v. *Blackerby*, 2 Atkins 144), the reasoning in which is also not clear" (85 F. [2d] at 67).

The earliest case cited by the petitioner, *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28 (1897) (Pet. 15), is based upon Lord Hardwicke's comments in *Vernon* v. *Blackerby* referred to by Judge Hand. The two other cases

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[1] In this case the plaintiff sought a mandatory injunction that the Secretary of the Interior be "commanded and enjoined to prepare for issuance unto your orator, in accordance with law, patents for said lands" (165 U. S. at 29). Since "the main object of the present bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to the plaintiff for the lands in question" (165 U. S. at 33) the presence of the Secretary of the Interior was indispensable in granting the specific affirmative relief prayed for.

principally relied on by the petitioner—*Webster* v. *Fall*, 266 U. S. 507 and *Gnerich* v. *Rutter*, 265 U. S. 388 (Pet. 15)—in turn are based upon the decision in *Warner Valley Stock Company* v. *Smith*.

The issue presented by the petition does not assume a federal character merely because it happens to arise between a federal officer and a state court. It is simply an issue of general equity jurisdiction which was in controversy before the formulation of our federal system of government. The Supreme Court of Nevada has now decided this question to its satisfaction for the purpose of litigation in the Nevada courts.

Section 8565 of the Nevada Compiled Statutes (1929) provides:

> "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in * * *"

The decision of the Supreme Court of Nevada to which the petitioner objects was simply a decision that, as a matter of general equity jurisdiction, the presence of the Secretary of the Interior was not necessary to a complete determination of this suit. That decision was one of state practice and procedure, and the decision of the Supreme Court of Nevada on such a subject is conclusive.

*Newman* v. *Gates*, 204 U. S. 89 (1907);
*John* v. *Paullin*, 231 U. S. 583 (1913).

This Court has uniformly held that it will not review a decision of a state court upon a purely state question even though questions of federal law are also presented by the record.

*Murdock* v. *City of Memphis*, 20 Wall. 590 (1875);
*Sauer* v. *New York*, 206 U. S. 536 (1907);
*Detroit & Mackinac Ry.* v. *Paper Co.*, 248 U. S. 30 (1918).

## CONCLUSION

For the reasons stated, we respectfully submit that the writ, if granted, should be restricted to Question 1, involving the construction of the Taylor Grazing Act.

Respectfully submitted,

WILLIAM J. DONOVAN,
2 Wall Street,
New York, N. Y.

MILTON B. BADT,
First National Bank Building,
Elko, Nevada,
*Counsel for the Respondents.*

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